85-435

No.

Supreme Court, U.S.
FILED
SEP 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE CITY OF GAINESVILLE, FLORIDA - - - - - - - Petitioner

versus

ISLAND CREEK COAL SALES COMPANY - - - - - - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is the decision of the United States Court of Appeals for the Sixth Circuit in conflict with the applicable decision of other Courts of Appeals and with the policy of arbitration in approving utilization of 9 U.S.C. Sec. 11 without compliance with statutory requirements?

II. Is the decision of the United States Court of Appeals for the Sixth Circuit in conflict with the applicable decisions of this Court and with those of other Courts of Appeals in approving District Court findings of fact regarding matters in arbitration?

III. Is the decision of the United States Court of Appeals for the Sixth Circuit in conflict with the Federal Rules of Civil Procedure in approving untimely amendment of a final judgment?

PARTIES TO THE PROCEEDING

PETITIONER — THE CITY OF GAINESVILLE, FLORIDA
(Defendant-Appellant)

RESPONDENT — ISLAND CREEK COAL SALES COMPANY
(Plaintiff-Appellee)

*Petitioner is a municipal corporation chartered by the State of Florida and has no affiliate corporations.

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No. _____

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ISLAND CREEK COAL SALES COMPANY - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF JURISDICTION

On June 10, 1985, the United States Court of Appeals for the Sixth Circuit affirmed the order entered by the United States District Court for the Western District of Kentucky modifying an Interim Order of a panel of the American Arbitration Association [764 F. 2d 437 (1985), Appendix p. 1a].

A petition for rehearing, filed with the appellate court, was denied on July 12, 1985 [Appendix p. 11a].

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATEMENT OF THE CASE

While the legal issues presented are well-defined, the facts surrounding the case spring from two complex commercial transactions: [1] a Coal Sales Agreement between a seller of coal (Island Creek Coal Sales) and

a utility buyer of coal (the City of Gainesville); and [2] an international, billion-dollar joint venture entered into between the Italian government and Occidental Petroleum Corporation (the parent of Island Creek Coal Sales). The impact of the creation of this joint venture on the relationship between Gainesville and Island Creek, and Gainesville's belief of improper action by Island Creek, are at the core of the litigation underlying the specific issue presented here, and at the core of related litigation pending in the United States Court of Appeals for the Eleventh Circuit.

The chain of events directly giving rise to the legal issues presented here began in May of 1983. After months of negotiations between the parties, Gainesville instituted an arbitration proceeding asking for a declaration of whether or not Island Creek had breached the agreement by a particular transfer of obligations. Island Creek filed no arbitration submission, nor was any form of equitable relief or damages requested by either party.

Pursuant to that arbitration submission, an arbitration hearing was held on May 10 and 11, 1983. The arbitrators had permitted no pre-arbitration discovery, and Gainesville was surprised by some of the evidence heard at that hearing. Based on that evidence, Gainesville acted five days later to exercise its common law and contractual right to cancel the agreement.

On May 19, 1983, Island Creek informally requested a hearing before the arbitrators to seek an order requiring Gainesville to perform under the agreement

pending the conclusion of the arbitration. On May 23, 1983, a telephone conference was held among counsel for the two parties and the three arbitrators, at the conclusion of which the arbitrators ruled that Gainesville would be required to continue performing under the agreement pending the final decision on the issue in arbitration. The arbitrators asked for input into the wording of the award, but Island Creek offered no suggestions. An "Interim Order of Panel" was then signed by two of the three arbitrators [Appendix p. 12a].

Despite the pendency of other litigation between the parties in the Northern District of Florida, Island Creek filed an action in the Western District of Kentucky seeking confirmation of the interim order pursuant to 9 U.S.C. Sec. 9. Gainesville filed a motion to vacate the interim order pursuant to 9 U.S.C. Sec. 10. On July 22, 1983, the District Court entered its final order confirming the interim order and denying Gainesville's motion to vacate it [Appendix p. 13a]. That decision was affirmed by the United States Court of Appeals for the Sixth Circuit on March 15, 1984, and it is not the subject of the present petition. Immediately after the District Court's order, Gainesville began taking coal from Island Creek and continued doing so until September 29, 1983, when the final arbitration award was rendered. That final award did not contain any provision ordering Gainesville to take any quantity or coal or to specifically perform the agreement.

The legal events giving rise to this Petition occurred while the appeal from the July 22, 1983 order was pending, timely notice of appeal having been given. While the appeal was pending, Island Creek for the first time, by way of a Motion for Contempt, asked the District Court to require Gainesville to "make up" shipments of coal "missed" from the time of the May 16, 1983 contract cancellation until the July 22, 1983 District Court order confirming the Interim Order of the arbitrators. At no time during the pendency of the confirmation petition before the District Court did Island Creek seek to have the matter remanded to the arbitrators for amendment, modification, further fact-finding, or clarification of the Interim Order. At no time prior to September 9, 1983, did Island Creek ever raise the question at all or suggest that there was any specific schedule on which it believed coal should be taken.

On October 21, 1983, the District Court entered an order (designated as "not final") declining to hold Gainesville in contempt, on grounds that Gainesville had a "legitimate question" as to the meaning of the prior order. However, despite the pendency of the appeal, and despite its recognition of the non-specificity of the Interim Order, the District Court required that Gainesville accept deliveries of coal on a specified schedule, and, having found as a fact such a specified schedule (without presentation of evidence or arbitrators' interpretation), further required that Gainesville accept additional deliveries of coal to make up

"missed shipments" [Appendix p. 14a]. On December 1, 1983, the District Court finalized that ruling [Appendix p. 19a].

Timely appeal from the December 1, 1983 order was taken. On June 10, 1985, the United States Court of Appeals for the Sixth Circuit, with a dissent, affirmed the December 1 order, holding that the District Court "found" facts properly and had authority to modify or correct the Interim Order pursuant to 9 U.S.C. Sec. 11(c). Since neither the District Court nor either party had ever raised the possible applicability of 9 U.S.C. Sec. 11(c) and no motion to correct had ever been made, Gainesville filed its motion for rehearing to urge reconsideration of the explicit limitations on the scope of 9 U.S.C. Sec. 11. No rehearing was ever sought with respect to Island Creek's cross-appeal. On July 12, 1985, the petition for rehearing was denied.

REASONS FOR ALLOWANCE OF THE WRIT

The policy favoring arbitration is a salutary one which promotes efficiency in the resolution of disputes. In furtherance of that policy, it has long been held that absent some fundamental unfairness in the arbitration proceeding or a decision beyond the bounds of the arbitration submission, arbitration orders should not be disturbed. *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960). The courts are not to substitute their judgment for that of the arbitrators. For this reason, the statutes providing

for judicial review are strictly construed to avoid intrusion into the province of the arbitrators.

The decision of the United States Court of Appeals for the Sixth Circuit is in conflict with that overall policy, and in apparent conflict with the decisions of other Courts of Appeals, in that it sanctions an impermissibly extensive involvement of the District Court in the arbitrable process, and fails to strictly interpret the United States Arbitration Act, 9 U.S.C. Sec 1, *et seq.* By thus inserting uncertainty into the conclusiveness of arbitration decisions, the Sixth Circuit decision has an impact far beyond this particular case. Unless the writ is granted and the limitations on judicial review clearly defined, this decision could have a strongly negative effect on the efficiency and informality of arbitration proceedings.

I. The Decision of the United States Court of Appeals for the Sixth Circuit Conflicts with Other Courts of Appeals' Decision Interpreting the Scope of Review Pursuant to the Federal Arbitration Act.

The interim arbitration order giving rise to this dispute was issued on May 23, 1983. On July 22, 1983, the District Court entered judgment in favor of Island Creek's Petition for Confirmation. On October 21, 1983, while the July 22 judgment was on appeal, the District Court issued the Opinion which gave rise to the second appeal (that with which we are now concerned) and which the Sixth Circuit has affirmed as justified by 9 U.S.C. Sec. 11. Such a justification was never previously offered by the District Court or by any party. However, 9 U.S.C. Sec. 11, by its own

terms, is unavailable to provide such justification because [1] 9 U.S.C. Sec. 11 is available only when invoked in a timely fashion (within 90 days of the challenged arbitration order); [2] no application for Sec. 11 modification was ever filed; and [3] 9 U.S.C. Sec. 11 is available only to address matters of form, not matters of substance [App. p. 25a]. The writ should be allowed here to address the conflict which this misapprehension of the statute has created between the Sixth Circuit and other courts and between the Sixth Circuit and the overall arbitration policy.

A. THE DISTRICT COURT WAS WITHOUT POWER TO MODIFY AFTER EXPIRATION OF THE NINETY DAY PERIOD.

9 U.S.C. Sec. 12 provides, in pertinent part, as follows:

> Notice of a motion to vacate [9 U.S.C. Sec. 10], *modify, or correct* [9 U.S.C. Sec. 11] an award must be served upon the adverse party or his attorney *within three months* after the award is filed or delivered (emphasis and bracketed material supplied).

This 90-day limitation period has been repeatedly held to be jurisdictional, and failure to observe the limitations period "forfeits the right to judicial review." *Corey* v. *New York Stock Exchange,* 691 F. 2d 1205, 1212 (6th Cir. 1982). *See also, Piccolo* v. *Dain, Kalman & Quail, Inc.,* 641 F. 2d 598, 600 (8th Cir. 1981).

In this case, the three-month limitation period expired August 23, 1983, well before any attempt by

Island Creek (or by the District Court) to modify or correct the arbitration Order. Accordingly, 9 U.S.C. § 11 was not available as a justification for the District Court's action herein.

B. NO APPLICATION FOR MODIFICATION WAS EVER MADE BY ANY PARTY.

The language of 9 U.S.C. § 11 itself provides, in relevant part, that

> A district court may make an order modifying or correcting the award *upon the application* of any party to the arbitration (emphasis supplied).

There is simply no contention in this case that any party to the arbitration *ever* made application under 9 U.S.C. § 11. Rather, after obtaining confirmation of the award of the arbitrators as written, and after that confirmation was on appeal, Island Creek submitted a motion for issuance of a show cause order. No show cause order was issued or hearing held. There is *no* authority for the proposition that a district court may *sua sponte* utilize 9 U.S.C. § 11. Where there has been no application by a party to the arbitration, the language of the statute itself precludes such *sua sponte* action.

C. SECTION 11 COULD NOT HAVE BEEN PROPERLY UTILIZED SINCE THE DISTRICT COURT'S ACTION INVOLVED A SUBSTANTIVE CHANGE OF THE AWARD.

As noted in the Sixth Circuit Opinion, 9 U.S.C. § 11 addresses itself to matters of form, not matters of sub-

stance. In this sense, it is analogous to Fed. R. Civ. P. 60(a), referring to clerical errors. As this Court put the matter in *Corey* v. *New York Stock Exchange, supra,* at Page 1212,

> Section 11 allows a district court to modify or correct an order for any miscalculation of figures or mistake in description, where the arbitrators have awarded upon a matter not submitted to them and where the award is imperfect in a matter of form *not affecting the merits* of the controversy (emphasis added).

Circuit Courts, including the Sixth Circuit, have recognized that 9 U.S.C. § 11 does not "license the district court to substitute its judgment for that of the arbirators." *Diapulse Corporation of America* v. *Carba, Ltd.,* 626 F. 2d 1108 (6th Cir. 1980). In *Diapulse,* the court struck down a district court's revision of an arbitration award "which transformed a very broad non-competition injunction into a relatively narrow one" [*Id.,* at 1110].

In the present case, the District Court addressed an arbitration award which broadly directed the parties to "continue performance" of a contract. The District Court *revised* that award to narrowly specify the manner in which performance was to take place, a matter not addressed by the arbitration award. Indeed, the Sixth Circuit noted at Page 7 of its opinion:

> The District Court *found* that Gainesville had previously accepted and paid for 10,000 tons of coal every eight days, and accordingly ordered it to continue doing so (emphasis supplied).

Additional problems with this "finding" will be addressed below, but it is sufficient for the present purposes to note that a revision which rests upon a finding of fact in the district court, a finding *not* made by the arbitrators or addressed in any fashion in the arbitration proceedings, is *necessarily* a revision which goes to substance rather than form. Thus, the "modification" in issue here was not of the type permitted by 9 U.S.C. § 11, even if there had not been procedural problems which prevented 9 U.S.C. § 11 from being available at all.

In *Cleveland Paper Handlers, Etc.* v. *E. W. Scripps Company,* 681 F. 2d 457, 460 (6th Cir. 1982), the court clearly recognized that "the courts may not go beyond the arbitration award to decide questions that the arbitrator did not decide" [*Id.,* at 460]. In that case, in the process of reaching its conclusion that an arbitration award was not ambiguous, the district court had addressed a side-letter which had not been construed by the arbitrator. The court stated, at Page 460:

> The District Court exceeded its authority by going beyond the arbitrator's award to interpret it.

Indeed, *Cleveland Paper Handlers* involved much the same type of improper "interpretation" of an arbitration award as is presented here:

> [The arbitrator] directed the parties to "negotiate a monetary settlement which will properly compensate the bargaining unit and the affected employees for the loss of situations." The District Court directed the parties to 'compute the dam-

> ages in the amount it would have cost [appellants] to man the bailer and core unwinding machines with members of the bargaining unit employed for such jobs had [appellants] not changed their manning practices, from the date of the changes to the date of the confirmation by this Court." The District Court again exceeded its authority by departing from the arbitrator's general language *to pick the date from which damages must be measured and to measure damages according to what it would have cost appellant* to man the bailer and core unwinder properly.

Cleveland Paper Handlers, at 460-461 (emphasis supplied).

Thus, because the District Court action herein was untimely, was not made on proper application of a party, and required resort to additional findings of fact to effect a change in substance rather than form, it could not be justified by 9 U.S.C. § 11. Accordingly, Gainesville respectfully submits that the District Court was without authority to modify the arbitration award as it attempted to do, and its decision must be reversed.

II. The Decision of the Sixth Circuit Court of Appeals Improperly Approves District Court Findings of Fact Without Presentation of Evidence.

While the decision of the Court of Appeals recognized that the District Court had made a finding of fact, which served as the basis for its order, the Court of Appeals failed to note that no evidence had ever been presented which would permit a factual finding to be made.

At Page 7 of its Opinion, the Sixth Circuit stated as follows:

> The District Court *found* that Gainesville had previously accepted and paid for 10,000 tons of coal every eight days, and accordingly ordered it to continue doing so. Gainesville does not contend that this finding is erroneous (emphasis added).

Indeed, Gainesville, has *vigorously* contended throughout these proceedings that it was completely erroneous for the District Court to make findings of fact at all, and all the more so because of the manner in which it was done.

Gainesville consistently attempted to point out to the District Court and to the Sixth Circuit that there has never been an opportunity to present any evidence regarding this matter. The issue was not raised before the arbitrators; the issue was not raised in the confirmation proceedings; Island Creek never made an attempt to have the matter remanded to the arbitrators for receipt of evidence on such an issue; even after the District Court's confirmation of the award, when the "show cause" proceedings were attempted and rejected by the District Court, there was never any evidentiary hearing or other opportunity for presentation of evidence on this issue. As Gainesville indicated to the District Court, and to the Sixth Circuit, if such an issue had been raised, if there had been the opportunity to present evidence regarding this issue, Gainesville would certainly have presented evidence that the

parties' conduct under the contract could *not* be so characterized.

The source of the District Court's "findings of fact" on this issue was simply a *statement of counsel* in connection with the motion for issuance of a show cause order. The District Court itself recognized this lack of evidence when it justified its finding of fact by "reading the contract and the parties' briefs" [Appendix p. 14a]. The District Court could not refer to any finding made by the arbitrators, or to any evidence presented to the arbitrators, or even to any evidence presented to the district court, for the simple reason that there had been none. Even in the District Court, no show cause hearing was ever held, nor was there any attempt by Island Creek to offer true evidence regarding this assertion of counsel. Thus, it is most certainly not correct that "Gainesville does not contend that this finding is erroneous." To the contrary, Gainesville's contention that such a finding was completely erroneous and improper lies at the very heart of its objection to the District Court's action.

Throughout these proceedings, Island Creek has offered *Marion Mfg. Co.* v. *Long,* 588 F. 2d 538 (6th Cir. 1978) as a justification for the District Court's action. However, this is, and always has been, a false issue. The question is not one of the date of effectiveness of an arbitration award; the parties have no disagreement as to that legal principal. Rather, the question is whether a District Court may, *after* the

arbitration order (indeed, after the confirmation of that order has been entered and is on appeal), make its *own* findings of fact for the purpose of substantively amending the arbitration order. Gainesville has consistently pointed out that neither the contract itself nor the arbitration order required Gainesville to take coal at any particular time. The contract required an annual minimum coal tonnage, subject to a specific weekly maximum. The arbitration order did not change those contractual requirements. However, the District Court order *did* change those contractual requirements, and it did so by making a factual determination without ever receiving any evidence.

Throughout these proceedings, Gainesville has attempted to point out that the concept of "missed shipments" required a finding of fact which could only be made by the arbitration panel, not by the District Court. The arbitration panel was not presented with any evidence as to such a fact, and it made no finding. Under these circumstances, the District Court was without authority to make its *own* finding of fact, particularly when it did so without receiving any evidence and relying only on the statement of counsel as to this disputed matter.

III. The Decision of the United States Court of Appeals for the Sixth Circuit Conflicts with Other Courts' of Appeals Decisions in Permitting Invasion of the Fact-Finding and Decision-Making Province of the Arbitrators.

The decision of the Sixth Circuit Court of Appeals sanctions a District Court's annexation of the power

to make findings of fact without the presentation of any evidence, as noted above. Furthermore, by affirming the District Court action herein, the Sixth Circuit has placed itself in conflict with other circuits by approving invasion of the fact-finding province of the arbitrators and permitting the District Court to substitute its judgment for that of the arbitration panel.

It has long been established that factual determinations are the province of the arbitration panel, not of the reviewing court. In *United Steelworkers* v. *Timken Roller Bearing Company,* 324 F. 2d 738 (1963), the Sixth Circuit had occasion to note that a district court is without authority to interpret an ambiguous arbitration award. In that case, the arbitrator had determined the rates of pay applicable to operators of certain machinery; the district court proceeded to fix "the effective date of the new rate." This was held to be improper, and the court directed that the matter should have been remanded to the arbitrator for clarification [*Id.,* at 741].

Similarly, in *International Brotherhood of Electrical Workers* v. *Olin Corp.,* 471 F. 2d 468 (6th Cir. 1972), the court held improper the district court's action in adding to an arbitration order which directed compensation "for loss of normal earnings," an addition which specified *how* those lost normal earnings were to be calculated. This calculation was an improper invasion of the province of the arbitrator, despite the fact that in that case the parties agreed in the district court on the figures involved in the calcu-

lation. Since the issue raised by the district court's attempted modification involved interpretation of the contract and the relationship between the parties, it could *only* be resolved by the arbitrator. *See also, Boston Shipping Association, Inc.* v. *International Longshoremen's Association,* 639 F. 2d 1 (1st Cir. 1981); *Oil, Chemical & Atomic Workers* v. *Rohm & Haas, Texas, Inc.,* 677 F. 2d 492 (1st Cir. 1982); *Bell Aerospace Co.* v. *Local 516, Int. U., United Automobile, Aerospace and Agricultural Implement Workers of America,* 500 F. 2d 921 (2nd Cir. 1974). Factual determinations by a reviewing court do not further the policy, purpose, procedure or law relating to arbitration agreements.

9 U.S.C. §§ 9-12 define the outer limits of a district court's authority on review or arbitration proceedings [App. p. 24a]. As Circuit Courts have recognized, "[t]he scope of review is limited by these provisions." *Corey* v. *New York Stock Exchange, supra,* at 1212. There is nothing in any of these sections which explicitly or implicitly authorizes the District Court to make findings of fact regarding the subject matter of the arbitration, and any such authorization would be contrary to the purpose and procedure underlying those sections. There is no "inherent" power to find facts because the District Court's involvement in commercial arbitration matters is entirely statutorily derived. The only statutory section which addresses such an issue in any way is 9 U.S.C. § 10(d) which speaks to the situation

> . . . where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the usbject matter submitted was not made.

In such a situation the District Court is *not* empowered to make findings of fact in order to arrive at a "mutual, final, and definite award," but, if the conditions in Subsection (e) are met, the court is limited to directing a rehearing by the *arbitrators.*

In *Boston Shipping* v. *International Longshoreman's Association, supra,* at p. 3 the court discussed the role of the federal courts in review of arbitrators' action:

> They are, and should be, most reluctant in the course of enforcing an arbitration award to modify, supplement or resolves ambiguities in the arbitrators' decision, even when it would appear in keeping with the intention of the parties to do so. *When enforcement requires an interpretation of the arbitartors' award, the proper course is to remand to the arbitrator for clarification* . . . (citations omitted; emphasis added).

There was never any request for the arbitrators to determine whether Gainesville had any obligation to accept coal according to any specific schedule nor was any such determination made. The contract included no such provision. The contract contemplated a total amount of coal which Gainesville would have been obligated to accept in a year, and further placed a maximum limit on the amount of coal that could be

taken in any one week. However, the contract did not establish any schedule of deliveries.

The District Court's authority in a case of this type is limited to a determination of whether the arbitrator had the power to enter the order for which confirmation is requested. 9 U.S.C. § 9. In confirming the order, the District Court expressed its determination that the arbitrators had the power to enter the order. The Sixth Circuit later affirmed that decision. The District Court did not propose any modification of the interim award in its July 22 final judgment.

The parties are in full agreement that any matters explicitly included in the arbitrators' order, or any matters *necessarily* implied by the arbitrators' order, are made binding by a District Court order of confirmation. The District Court Order of December 1, 1983, however, imposed on Gainesville obligations which were neither explicitly stated nor necessarily implied in the arbitrators' award. Accordingly, the District Court overstepped its authority, and the Order imposing those additional obligations must be vacated.

Even if the interim arbitration award could be construed as ambiguous, it is not the prerogative of the District Court to resolve such ambiguities. Rather, any ambiguous provisions would have to be construed by the arbitrators, not by the District Court. *Bell Aerospace Company Division of Techtron* v. *Local 516, supra; United Papermakers* v. *Westvaco Corporation,* 461 F. Supp. 1022 (D. Va. 1978).

The terms of the written contract required Gainesville to accept 405,000 tons of coal for each year the contract was in effect, with an optional maximum of 20,000 in a given week. This is the extent of the contract language regarding the amount of coal; there is no reference to any specific delivery schedule in the contract nor was any established by the arbitrators.

Since the contractual language did not set forth a schedule on which coal deliveries were to be made, if the arbitrators sought to impose such an obligation, they would be required to do so explicitly.[1] That was not done, and the interim award required simply that Gainesville "continue performing" the contract. Since it was not set forth in the contractual language, and it was not set forth in the interim award, then it was necessarily an amendment of that award. Such amendment by a District Court in a confirmation proceeding is not permitted. Questions of contract interpretation must be left to the arbitration panel.

Island Creek argued in the District Court—long after entry of the July 22 judgment—that the "course of performance" between the parties supports the December 1 order. This argument must fall of its own weight since the record contains *absolutely no evidence*

[1]It should be noted that there would be a serious question of legality if it had been the arbitration panel which imposed the obligation to accept coal deliveries on a rigid and enforceable schedule, since that schedule not only does not appear in the written contract but actually *contradicts* the total tonnage requirement, a specific term of the written contract. However, since it was the District Court and not the arbitrators who imposed that obligation, that question is not presented here.

of "course of performance." Secondly, the position that Gainesville was required because of some factually unsupported "course of performance" to accept 10,000 tons of coal every eight days would be in direct contradiction to the explicit terms of the contract. The contract specifically permitted Gainesville to order up to 20,000 tons of coal per week, and required Gainesville to accept total annual tonnage of only 405,000. Simple mathematics demonstrates that the obligation for which Island Creek argued following the final judgment in the District Court, and which was imposed by the December 1 judgment challenged here, would require Gainesville to accept an annual total of 456,000 tons. No obligation can be implied from "course of performance" which would serve to directly contradict the specific terms of a written contract.

Thirdly, if the issue had been raised in the proper forum — the arbitration panel — Gainesville would have presented evidence that the "course of performance" did *not* support the obligation imposed by the December 1 order. Since the issue was never raised, no opportunity to present such evidence arose. This is certainly not a matter as to which Gainesville had any burden of going forward with evidence, since Gainesville had no way of knowing prior to the post-judgment District Court proceedings that such an allegation would be made. Given the opportunity, Gainesville would have presented evidence that its coal orders varied widely in amount and timing during the life of

the contract, and there was no consistent "course of performance."

Finally, the argument that "course of performance" justified the imposition of the additional obligations of the December 1 judgment was not properly presented to the District Court. Such an argument could only be presented to the arbitrators, since they, rather than the District Court, have the responsibility for the interpretation of a contract and for resolution of disputed matters of fact. Indeed, as noted above, the "course of performance" argument falls of its own weight, since it necessarily raises a factual issue, and factual issues are not to be raised in confirmation proceedings in District Court.

IV. The Decision of the United States Court of Appeals for the Sixth Circuit Conflicts with Decisions of This Court in Permitting Untimely Amendment of a Final Judgment.

It is undisputed that no language referring to "missed shipments" ever appeared in any order prior to October 21, 1983. The concept of "missed shipments" is only meaningful if Gainesville had been contractually obligated to accept shipments on some specific schedule. However, neither the contract itself nor the interim arbitration award set forth any such schedule. Furthermore, there was no mention of any such schedule in the July 22 final judgment. Thus, the December 1 judgment represented a substantive amendment of the July 22 final judgment. The docketing of the appeal of the July 22 final judgment de-

prived the District Court of authority to make such a substantive amendment. The Sixth Circuit affirmance conflicts with the policy of liability of judgment. *Browder* v. *Director,* 98 S. Ct. 556 (1978).

The October 21 opinion refers to the challenged order as a "clarification" of the July 22 judgment [Appendix p. 17a]. The December 1 opinion refers to it as an "interpretation" of the July 22 judgment [Appendix p. 22a]. It raises an issue which was never briefed, argued or otherwise addressed prior to the docketing of the appeal of the July 22 judgment. Indeed, the District Court opinion of October 21 recognized that "the City [Gainesville] had a legitimate question as to the specifics of the Court's [July 22] order" [App. p. 16a].

The only authority for substantive alteration of a judgment is found in Fed. R. Civ. Pro. 59(e). However, Rule 59(e) may only be utilized within ten days of the entry of judgment. *Browder, supra.* In the present case, no whisper of the amendment or "interpretation" of the July 22 judgment was heard until long after the expiration of the ten days and the filing of the Notice of Appeal. At that point, "interpretation" of a judgment could only be authoritatively done by the Sixth Circuit. Even then, the Sixth Circuit Court has no authority to interpret an arbitration award or to address issues not properly raised by Island Creek below.

In *Gray* v. *Dukedom Bank,* 215 F. 2d 108 (6th Cir. 1954), the court entered a judgment on October 17,

1952, including no mention of interest. On July 6, 1953, the prevailing party filed with that court a motion to require payment of the judgment with interest, a motion which was sustained on August 5, 1953. On appeal, the court held that the August 5, 1953 judgment was not authorized, pointing out that the omission of mention of interest in the October 1952 judgment involved a question of law, and constituted a judicial ruling which could only be addressed by Fed. R. Civ. Pr. 59 or by appeal. Thus, the trial court's action, taken more than ten days after the original judgment, was void as without authority.

Similarly, in *Jetero Construction Company, Inc.* v. *South Memphis Lumber Company,* 531 F. 2d 1348 (6th Cir. 1976), the appellate court, citing "the interest of finality," held that an amended judgment was void where entered one month after the original judgment, and where there had been no intervening Rule 59 motion.

Island Creek did not raise the issue addressed by the December 1 judgment either before the arbitrators or before the District Court prior to the July 22 judgment. Neither did Island Creek file a motion pursuant to Rule 59 to address such an issue. Just as Island Creek would not have had authority to move to amend the judgment more than ten days after its entry, neither did the District Court have *sua sponte* authority to make such an untimely amendment. *Hodgson* v. *American Can Company,* 317 F. Supp. 152 (W.D. Ark. 1970).

It is equally clear that authority for entry of the December 1 judgment cannot be found in the "inherent power" of the Court. Inherent power is that which is implied, and implied authority does not reach to that which is explicitly prohibited. Fed. R. Civ. Pro. 59 explicitly prohibits alteration of judgments except within ten days of their entry.

As was stated in *Milwee* v. *Peachtree Cypress Inv. Co.*, 510 F. Supp. 284, 290 (D. Tenn. 1978):

> Motions [to amend] are not intended to be utilized to relitigate old matters nor to allow a party to present his case under a new theory. . . .

Although the Sixth Circuit characterized the District Court action as an attempt "to supervise its judgement," the effect is a substantive amendment of its order. If the mechanism specifically provided for substantive amendments such as that in issue here would not permit Island Creek to press the new theory, it is certain that no "inherent power" of the Court would do so.

Accordingly, the District Court lacked authority to impose additional obligations in an action which was then on appeal. The Sixth Circuit decision affirming the December 1 judgment (and the October 21 non-final order) injects an unacceptable element of uncertainty into what should be final judgments, with an impact beyond the parties to this particular case.

CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit, by permitting a District Court's untimely and substantive amendment of an arbitration order on the basis of findings of fact made in the District Court without presentation of evidence, is at odds with the arbitration policy as enunciated by this Court and by the applicable statutes, and is in conflict with the decisions of other Courts of Appeal. The action of the Sixth Circuit frustrates the policy underlying arbitration, and impermissibly introduces an element of extreme uncertainty for those contracting parties who are relying upon or considering reliance upon arbitration provisions and final District Court decisions.

Therefore, Gainesville respectfully submits that its petition for a writ of certiorari should be granted in the interest of resolving a conflict, and removing the uncertainty which has been injected into the arbitration scheme.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 84-5108, 84-5144

ISLAND CREEK COAL SALES COMPANY - - - - - - *Plaintiff-Appellee, Cross-Appellant,*

v.

THE CITY OF GAINESVILLE, FLORIDA - - - - - - - *Defendant-Appellant, Cross-Appellee.*

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed June 10, 1985

Before: MERRITT and WELLFORD, Circuit Judges; and EDWARDS, Senior Circuit Judge.

WELLFORD, Circuit Judge, delivered the opinion of the Court in which EDWARDS, Senior Circuit Judge, joined. MERRITT, Circuit Judge, (p. 10) delivered a separate dissenting opinion.

WELLFORD, Circuit Judge. Two issues are involved in this continuing dispute between the parties who entered into a substantial long-term coal supply agreement. The first issue involves the power of a district court to enforce or clarify its judgment during the pendency of an appeal. The second issue involves the meaning and enforceability of an arbitration award under the Arbitration Act, 9 U.S.C. §§ 1-11.

On July 26, 1978, Island Creek Coal Sales Company ("Island Creek") and the City of Gainesville ("Gainesville") entered into a long-term coal sales agreement, with the coal to be extracted from a mine known as "Holden 22" in Kentucky. The price of coal subsequently declined, and in January 1983 Gainesville sought to terminate the sales agreement. Gainesville, pursuant to the terms of the sales agreement, instituted an arbitration proceeding in Louisville, Kentucky. As a basis for terminating the agreement, Gainesville asserted that Island Creek had breached the contract by transferring operation of Holden 22 to another entity. Island Creek denied that it had transferred operation of the mine.

On May 10-11, 1983, a full evidentiary hearing was held before a three-member arbitration panel. Following the hearing, the panel informed the parties that it tentatively favored Island Creek's position. On May 16, prior to the issuance of any order by the panel, Gainesville announced its intention to terminate the agreement notwithstanding the pendency of the arbitrators' decision. On May 23 a telephone conference was held in which counsel for the parties and the arbitrators participated. Following the conference, the panel issued an interim order directing Gainesville to "continue performance of the contract . . . by accepting shipments of coal from the Holden 22 mine. . . ."

On May 31, 1983, Gainesville instituted an action in the Northern District of Florida, charging Island Creek with various acts of fraud and violations of federal and state racketeering laws, as well as seeking to avoid the decision of the arbitration panel.[1] That same day Island Creek commenced the present action in federal court in the West-

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[1]Island Creek has since been granted summary judgment in that action. No. GCA-83-0052-MMP.

ern District of Kentucky, seeking confirmation of the arbitrators' award. The court immediately stayed any proceedings in Florida that might involve the arbitration award, and on July 22, 1983, entered judgment confirming the arbitrators' interim award.[2]

Immediately following the entry of judgment, Gainesville filed its notice of appeal. While the appeal was pending, on September 9, 1983, Island Creek moved the district court to issue a contempt order against Gainesville because of Gainesville's persistent refusal to comply with the court's July 22 judgment. On October 21, 1983, the court, though refusing to hold Gainesville in contempt, issued an opinion in which it found that Gainesville was not in compliance with its judgment. Gainesville had not accepted nine shipments of coal tendered to it and delivered in Florida from Island Creek's mines between May 23 and July 22, the time between the arbitrator's interim order and its confirmation by the district court. The district court ordered Gainesville to enter into "a mutually agreeable time table" with Island Creek for the purpose of correcting its noncompliance, and also ordered Gainesville to "maintain the 'status quo' " by accept[ing] 10,000 tons of coal every eight days." Judge Allen noted that he was not altering or modifying the July 22 award; rather, he was simply clarifying the award to force Gainesville to do what was required of it under the arbitrators' prior decision.

Gainesville, on October 31, 1983, moved to vacate the district court's October 21 order. On December 1, 1983, the district court denied this motion and ordered Gainesville's compliance under pain of contempt. On December 12, 1983, Gainesville moved to amend the December 1 order. Following a hearing, the court on January 24, 1984, stayed

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[2]This judgment was affirmed by this court. *See* 729 F. 2d 1046 (6th Cir. 1984).

its December 1, 1983 order pending the outcome of the appeal. The stay was conditioned, however, on Gainesville's posting a $1,469,000 bond "to secure its performance" of the December 1 judgment. The January 24 order required that Gainesville commence performance of its obligations within thirty days of receipt of the mandate. Forfeiture of the bond was predicated on Gainesville's failure to perform any of its obligations contained in the December 1, 1983 order.

Gainesville filed this timely appeal challenging the authority of the district court to enter these October, December and January orders. Island Creek cross-appeals, seeking to have the January 24 forfeiture order clarified to require forfeiture of the bond should Gainesville fail to accept and pay for the nine shipments tendered to it over 20 months ago.

It was on March 15, 1984, following Gainesville's second notice of appeal, that this court affirmed the July 22 order of the district court. We held that the district court properly confirmed the arbitrators' interim order, and rejected all of Gainesville's arguments to the contrary.

Generally, notice of appeal deprives the district court of jurisdiction of all matters forming the basis of the appeal. This rule, however, is neither a creature of statute nor is it absolute in character. *Jago* v. *United States District Court,* 570 F. 2d 618 (6th Cir. 1978).

> [W]here the district court . . . has a continuing duty to maintain a status quo, and where, as the days pass, new facts are created by the parties and the maintenance of the status quo requires new action, . . . an appeal from the supervisory order does not divest the court of jurisdiction. . . .

Hoffman v. *Beer Drivers & Salesmen's Local Union No. 888,* 536 F. 2d 1268, 1276 (9th Cir. 1976). Where, as here, the

district court is attempting to supervise its judgment and enforce its order through civil contempt proceedings, pendency of appeal does not deprive it of jurisdiction for these purposes. *Farmhand, Inc.* v. *Anel Engineering Industries, Inc.*, 693 F. 2d 1140, 1146 (5th Cir. 1982); *Brown* v. *Braddick*, 595 F. 2d 961, 965 (5th Cir. 1979).

In the present case, the arbitration award ordered Gainesville to "continue performance of the contract . . . by accepting shipments of coal from the Holden 22 mine . . . ." In its July 22 order the district court confirmed this award.[3]

Thereafter, Gainesville began accepting coal shipments from Island Creek. However, Gainesville refused to accept the nine May-July shipments, and also refused to pay anything for the first six shipments it did accept following the confirmation. Because of this, Island Creek sought to have Gainesville held in contempt. We conclude that the district court did not err in exercising jurisdiction over this matter despite the notice of appeal. The July 22 order was not stayed pending appeal, nor was a bond filed. The order was thus open to supervision and enforcement by the district court. *Braddick*, 595 F. 2d 961.

Gainesville next argues that because the arbitrators' interim order only required that it accept future shipments, the district court lacked authority to order that it do anything more. Gainesville claims that by ordering it to accept the nine shipments at issue, and by requiring it to accept and pay for all shipments on a scheduled basis, and to pay

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[3]We stated:

> Chief Judge Allen concluded that "[t]he interim award disposes of one self-contained issue, namely, whether the City is required to perform the contract during the pendency of the arbitration proceedings."

729 F. 2d 1049.

for coal already received, the district court overstepped its limited authority under the Arbitration Act.

Indeed, it is true that, as a general principle, a court does not have the power or authority to correct or modify either an incomplete or ambiguous arbitration award. Instead, the case should be resubmitted to arbitration for clarification. *See Annot.*, 36 A.L.R. 3d 939, 945 (1971). The Arbitration Act grants the federal courts the authority to correct or modify an award only in limited circumstances. 9 U.S.C. § 11. That statute provides in relevant part that

> a district court may make an order modifying or correcting the award upon the application of any party to the arbitration —
>
> * * *
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

In this case the arbitrators' order required Gainesville to "continue performance of the contract . . . by accepting shipments of coal . . . ." The intent of that order seems clear. Gainesville is bound by the sales contract and must perform its understandings thereunder. We hold that the district court possessed authority under 9 U.S.C. § 11 to enforce the clear meaning and intent of that order. The district court's order that Gainesville accept the missed shipments, receive future shipments on a scheduled basis, and pay for all the coal it received is an effort merely to require that Gainesville perform as the arbitrators have ordered it to "continue performance."

Moreover, it is not clear that the district court either corrected or modified the interim order in any respect. The

court only required Gainesville to do specifically that which was inherently required of it by the arbitrators under the contract.[4] Specific performance of the sales agreement required that Gainesville purchase a specific amount of coal, which was required by the contract to be delivered "in unit trains of not less than five thousand (5,000) tons nor more than ten thousand (10,000) tons capacity . . . ." Further, the agreement provided that "[u]nit trains shall be scheduled for shipment at reasonably equal intervals . . . throughout the year. . . ." The district court found that Gainesville had previously accepted and paid for 10,000 tons of coal every eight days, and accordingly ordered it to continue doing so. Gainesville does not contend that this finding is erroneous. Because the arbitrators ordered Gainesville to "continue performance," it is clear that this meant it should do as it had done in the past in respect to carrying out its obligations. The district court's order in dispute only serves to confirm and enforce the *arbitrators'* award in the face of obdurate opposition by Gainesville.

The district court properly refused to set a specific price that Gainesville must pay for the coal it received, because that is a matter that Gainesville has submitted to another arbitration. Instead, the court ordered that Gainesville is obliged to pay the contract price established by a formula contained in the sales agreement. To ensure that all the coal accepted was paid for, the court in its final order required Gainesville to post a bond. Because the contract is silent about requiring a bond, we must consider whether the court acted within its proper authority in this regard. We are not unsympathetic with Judge Allen's actions, because

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[4]We recognized that the prior arbitration interim award was appropriate, provided "equitable relief," and required "specific performance . . . pending completion of the arbitration." 729 F. 2d at 1048, 1049.

it would be anomalous to conclude that the arbitrators ordered only acceptance of coal and not payment therefor.

Since, however, it is conceded that the matter of price for coal under the contract is now before arbitration, and since Gainesville is presumably capable of meeting its financial obligation once determined by the arbitrators, we will set aside that portion of the district court's order requiring that Gainesville post a bond to satisfy its obligation; provided Gainesville pays promptly to Island Creek an amount equal to the minimum price it contends in good faith to be due for the coal it has already received but not paid for under the previous order of the arbitrators as confirmed by this court. The contract, of course, sets out the annual maximum amount of coal which Gainesville is required to accept.

We believe our decision is not only logical and reasonable, but it is also consistent with the policy and purpose of the Arbitration Act. "The purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings." *Diapulse Corp. of America* v. *Carba, Ltd.*, 626 F. 2d 1108, 1110 (2d Cir. 1980). The position advanced by Gainesville would require federal courts to remand for clarification or correction every arbitration award disputed by one of the parties in the event it is brought to federal court for confirmation and enforcement. This would make for an expensive and tedious process, directly opposite to the purpose of arbitration. Further, for an unsuccessful party to force a successful adversary to resort to the federal courts for confirmation and/or interpretation of an extended contract arbitration award, in the event of objections to every detail thereof, would render a reasonable arbitration award ineffectual.

We accordingly AFFIRM the judgment of the district court in all respects, save the bond requirement. The orders

of Judge Allen, with that exception, were made within his proper jurisdiction and authority, even if the court's action could be characterized as a modification or correction of the arbitrator's interim order. *See* 9 U.S.C. § 11(c). In light of Gainesville's position throughout the course of this dispute, we find the district court's orders were necessary "to effect the intent [of the arbitrators' decision] and promote justice between the parties." 9 U.S.C. § 11(c). To act otherwise, in light of this record, would be to preclude the district court from taking action necessary to ensure specific performance of the sales agreement, which had been directed by arbitration, confirmed by the district court, and affirmed by this court in a prior order.

The setting aside of the bond requirement, however, is specifically conditioned upon Gainesville's making payment within thirty days from entry of this opinion to Island Creek of the minimum amount that it contends in good faith is due under its interpretation of the contract for coal already received. (This would serve as a credit or offset to Gainesville depending upon the arbitration award as to price).

Accordingly, we AFFIRM the orders of the district court with the exception and condition herein noted.

MERRITT, Circuit Judge, dissenting. It seems to me that the District Court, in ordering Gainesville to take a coal shipment every 8 days, invades the province of the arbitrators. The parties contracted for arbitration of the issues. How the missed shipment situation should be corrected should address itself in the first instance to the arbitrators. The effect of what the District Judge did was to order compensation for past wrongs, an issue clearly subject to arbitration. What has happened here is that Island Creek, once it got its order confirming the arbitrators on another issue, wanted to use its position to improve its situation by getting the District Court to issue a so-called

"clarifying injunction" on a different question not yet submitted to the arbitrators.

This view is reinforced when we consider the problem of assessing the value of the coal and the amount that Gainesville should be required to pay for these shipments. This pricing question is obviously one for the arbitrators, and by deciding the shipment question before it is arbitrated the Court got itself into the situation of having to decide this valuation question on a contempt petition.

The overriding principle here is to recognize the separate roles of the federal judiciary and arbitrators in cases where the parties have contracted for arbitration. The Court's decision mixes up these roles rather than keeping them separate.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 84-5108/5144

ISLAND CREEK COAL SALES CO., - - *Plaintiff-Appellee,*

v.

THE CITY OF GAINESVILLE, FLORIDA, - *Defendant-Appellant.*

ORDER

BEFORE: MERRITT and WELLFORD, Circuit Judges, and EDWARDS, Senior Circuit Judge.

Following the Court's decision heretofore rendered, the appellant, City of Gainesville, has filed a petition for rehearing out of time. The Court has considered the petition for rehearing out of time and believes that no sufficient basis has been set out.

Accordingly, the motion is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between

RE: 52 111 0006-83
City of Gainesville, Florida
and
Island Creek Coal Sales Co.
Lexington, Kentucky

INTERIM ORDER OF PANEL

Comes now Island Creek Coal Sales Company, the Respondent, in the proceedings now before this panel, and orally moves the panel for an order directing that the Claimant, City of Gainesville, Florida, be ordered by the panel to maintain the status quo as it existed on May 11, 1983 by accepting shipments of coal from the Holden #22 Mine, pending the final decision of the panel, after all parties have briefed the issues before the panel, and the panel having heard the oral argument of counsel for both parties, and the panel being duly advised in the premises.

It Is Therefore Ordered that pursuant to said motion by Island Creek Coal Sales Company, the City of Gainesville, Florida is hereby directed to continue the performance of the contract made the subject of this arbitration by accepting shipments of coal made from the Holden #22 Mine, until further order of this panel. This order is entered by the panel pursuant to the rules of Commercial Arbitration of the American Arbitration Association, including, but not limited to Rules #34 and 43 thereof.

Dated this 23rd day of May, 1983.

(s) Lyle L. Ringgenberg
L. B. Rahn
(s) Jack R. Brenton, Chairman

cc: David Zerbe
Stephen Pitt
Stanley Saunier

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 83-0516 L(A)

ISLAND CREEK COAL SALES COMPANY, - - *Plaintiff,*

v.

CITY OF GAIESVILLE, FLORIDA, - - - *Defendant.*

JUDGMENT

This case, having come before the Court on several motions, and the Court, having been advised and having entered its memorandum opinion,

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss be and it is hereby overruled.

IT IS FURTHER ORDERED AND ADJUDGED that defendant's motion to vacate the interim arbitration award be and the same is hereby overruled.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff's petition to confirm the interim arbitration award be and it is hereby sustained.

IT IS FURTHER ORDERED AND ADJUDGED that the interim arbitration award be and it is hereby confirmed.

This is a final and appealable judgment and there is no just cause for delay.

Dated: 7/22/83

(s) Charles M. Allen
Chief Judge

cc: Counsel of Record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ISLAND CREEK COAL SALES COMPANY

v.

CITY OF GAINESVILLE, FLORIDA

Civil Action No. C83-0516-L(A)

MEMORANDUM OPINION

Island Creek Coal Sales Company has prosecuted this action against the City of Gainesville, Florida (the City), seeking confirmation of an "interim" arbitration award issued on May 11, 1983. The arbitration panel issued the "interim" or "status quo" award to preserve the status quo of the parties to a coal sales contract while the panel considered a dispute relating to an alleged breach of the contract. This Court confirmed the award on July 22, 1983. Island Creek now moves for a contempt order and for punitive damages and punishment of the City for allegedly refusing to comply with the confirmation order. After due consideration, this Court overrules the motion for contempt at this time. However, this Court clarifies its order and will entertain another contempt motion if the parties do not comply with the order as clarified.

The May 11th award ordered the parties to maintain the "status quo" of the contract. As this Court understands from reading the contract and the parties' briefs, the status quo required the City to accept 10,000 tons of coal every eight (8) days. According to Island Creek, the City refused to accept nine (9) deliveries while the motion for confirmation was pending before this Court. This Court

understands that it is those nine shipments which are at issue and that the City has faithfully accepted delivery of shipments since this Court's July 22nd order. Island Creek does not appear to contest the one subsequent occasion when the City's train was derailed. Island Creek argues that the City was required to make up the refused shipments under the interim order. The City argues that this Court's order is ambiguous and that as long as the City fulfills its contractual obligations to accept a specified total amount of coal during the contract year, the City should not be required to purchase back orders of coal. The parties debate whether the wording of the July 22nd order specifically incorporated by reference the May 11th award, whether Island Creek or the City should have moved the Court for clarification of the award and whether the award or this Court's order specifically ordered the parties to perform any act.

This Court confirmed the arbitration panel's award as issued, 9 U.S.C. Sec. 9, without any modification under 9 U.S.C. Sec. 11. Therefore, this Court's order reflected "what would have happened had the parties immediately complied with the award instead of going to court." *Marion Manufacturing Company* v. *Long,* 588 F. 2d 538, 542 (6th Cir. 1978). Therefore, the City is obligated to accept the missing shipments.

The Court clarifies its order to reflect that the City should make arrangements to accept the shipments which it refused while the case was pending. However, the Court has no desire to work unreasonable hardship on the City or to direct the actual proceedings between the parties. This Court directs the parties to meet and establish a mutually agreeable timetable for the acceptance of the nine missing shipments. This timetable shall not interfere with the continuation of regular shipments under the contract. The timetable should also reflect "commercial reasonableness"

in railroad scheduling and the availability of suitable transportation. Payment for these and other shipments shall be in accordance with the terms of the contract. This Court is reluctant to become involved in the actual scheduling of the shipments, but will do so if the parties make this extreme step necessary. If the parties do not reach an agreement within thirty (30) days from the date of this order, the parties shall inform the Court and the Court will schedule the shipments. The parties are advised to make their own agreement.

After due consideration, this Court declines to hold the City in contempt or to award punitive damages. The City had a legitimate question as to the specifics of the Court's order. The City's compliance with the post-July 22nd phase of the order is sufficient evidence of the City's good faith. This Court awards punitive damages or punishment damages only on a showing of egregious or outrageous conduct, which has not quite been shown here. Noncompliance with this order may be a different matter.

This Court does not reach the question of who was required to seek clarification of the award. However, a minimum attempt at mutual accommodation and good faith would have resolved this controversy before reaching the extreme step of a contempt motion. If nothing else, a joint motion for clarification would have been in order.

Date: 10/21/83

(s) Charles M. Allen, Chief Judge

Copies to Counsel of Record

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
LOUISVILLE

ISLAND CREEK COAL SALES COMPANY *v.* CITY OF GAINESVILLE, FLORIDA	Civil Action No. C83-0516-L(A)

ORDER

This case having come before the Court on the plaintiff's motion for a contempt order, and the Court having been advised, and entered its memorandum opinion,

IT IS ORDERED that the motion for contempt and punitive damages be, and the same hereby is overruled.

IT IS FURTHER ORDERED that this Court's order of July 22, 1983, be, and the same hereby is clarified to reflect that the defendant City is required to accept the nine (9) missing shipments which it refused to accept during the pendency of the confirmation proceedings before this Court.

IT IS FURTHER ORDERED that the City make payment for these and other shipments as directed by the terms of the coal sales agreement (contract) between the parties.

IT IS FURTHER ORDERED that the City and Island Creek meet to establish a mutually agreeable timetable for the acceptance of the nine (9) missing shipments, taking into account commercial reasonableness in the scheduling of railroad transportation.

IT IS FURTHER ORDERED that the timetable established by the parties shall have no effect on the continuing shipments of coal to the City under the Court's order of July 22, 1983.

IT IS FURTHER ORDERED that the parties inform the Court if they do not reach an agreement within thirty (30) days from date of this order.

IT IS FURTHER ORDERED that all other motions be, and the same hereby are, overruled.

This is not a final and appealable order.

Date: 10/21/83

(s) Charles M. Allen, Chief Judge

Copies to Counsel

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 83-0516 L(A)

ISLAND CREEK COAL SALES COMPANY, - - - *Plaintiff,*

v.

CITY OF GAINESVILLE, FLORIDA, - - - - *Defendant*

MEMORANDUM OPINION

Island Creek Coal Sales Company originally brought this action seeking confirmation of an arbitration panel's award in a contract dispute with the City of Gainesville. The case is now before the Court on the City's motion to vacate a subsequent order of this Court relating to that award. After due consideration, this Court overrules the motion to vacate.

Again, a brief chronology of events and procedural history is in order. On July 22, 1983, this Court confirmed a "status quo" or "interim" award of an arbitration panel relating to a contract dispute between the two parties. The panel issued its award on May 23, 1983 during a telephonic conference call. The underlying arbitration hearing (relating to whether Island Creek had breached the contract by assigning the contract) had been held in Louisville. Subsequently, the City cancelled the contract and this litigation began. The arbitration panel ordered the parties to maintain the "status quo" of their relationship as of May 11, 1983, until the panel reached a decision on the underlying dispute.

This Court confirmed the May 23, 1983 award on July 22. Afterwards, the City resumed acceptance of coal at the same rate at which it was receiving coal before May 11. However, the City refused to accept the shipments of coal which it had missed between May 23 and July 22. Island Creek petitioned this Court for a finding that the City was in "contempt" for refusing to accept the missing shipments. The City responded that it was not in contempt because it (the City) was not obligated to accept the missing shipments. On October 21, 1983, this Court issued a memorandum opinion and order which found that the City was obligated to accept the missing shipments, but overruled the motion for contempt. The City now attacks the October 21 order.

Initially, the City proceeds from a misinterpretation of our October 21 order. In its memorandum in support of its motion to vacate, filed October 31, 1983, the City states as follows:

> [t]his Court denied the petition for a contempt citation, agreeing that the July 22 order did not impose on the City the obligation to accept coal on any given schedule. However, the order then went on to *sua sponte* impose on the City just such an obligation and purport to revoke the finality of the July 22 judgment.

Mem. at 2. Regretfully, we find that the City has misread our order.

The October 21 order concluded that the City, indeed, was under an obligation to accept the missing shipments of coal. *Marion Manufacturing Company* v. *Long,* 588 F. 2d 538 (6th Cir. 1978). The Court found that the City was not in contempt because the City demonstrated "good faith" to the extent that it accepted subsequent shipments, not because it was not obligated to accept the missing ship-

ments. Moreover, contempt damages are a disfavored remedy and will be assessed only as a last resort.

Marion Manufacturing holds that under an arbitration award, the parties are obligated to proceed as if they had complied with the arbitration award instead of proceeding to court. 588 F. 2d at 541-42. In this case, the City was accepting a specified amount of coal every eight (8) days under the contract before May 11. The May 23 award specified that the parties maintain the "status quo" that existed May 11. (May 23 Tr. at 63). Had the parties maintained the status quo instead of going to court, the City would have continued to accept a shipment of coal every eight days (the Court notes that the City has resumed performance on that very schedule). It is obvious that Island Creek sought continuation of that schedule from the arbitrators on May 23, and it is obvious that the arbitrators ordered the City to continue that schedule. (May 23 Tr. at 63). In fact, the City's counsel indicated such an understanding by asking that the arbitrators require Island Creek to post a bond for the coal which the City would be required to accept under the "status quo" award over the next three months while the underlying contract dispute was under submission to the arbitrators. (May 23 Tr. at 57). Therefore, the City's duty to accept coal shipments under the "interim" or "status quo" award dated from May 23, not July 22.

The City argues that the Court added *additional* duties to those prescribed by the arbitrators and destroyed the "finality" of the July 22 order by issuing a "sua sponte" order. We strongly disagree with that characterization of the October 21 order. The October 21 order did not "add" any duties which the City was not already required to perform. Rather, the October 21 order answered whether or not the July 22 order required the City to perform a specific task in order to be in compliance. As this Court reads

the *Marion Manufacturing* case, the City is required to perform the specified act, namely, accept the missing shipments of coal which would have been accepted between May 23 and July 22. Since the City was required to accept the shipments under *Marion Manufacturing,* the Court's October 21 order did not "add" any duties the City was not already required to perform. Therefore, the October 21 order did not disturb the finality of the July 22 judgment. Instead, the October 21 order merely "interpreted" rather than "amended" the July 22 judgment.

The parties again dispute who should have asked for a "clarification" or a "remand" to the arbitrators. This Court repeats its statement in the October 21 order that a "minimum of good faith on each side would have resolved this issue" short of this extreme.

After due consideration, this Court declines to become involved in arranging the contract terms with the parties if they do not reach agreement under the October 21 order. This Court will vacate so much of that order which requires the parties to notify the Court after the passage of the thirty-day period. The parties shall reach their own agreement. Failure to accept the missing shipments of coal will be grounds for a finding of contempt. The parties may make the appropriate motions.

A judgment in accordance with this memorandum opinion will be entered this day.

Dated_____

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 83-0516 L(A)

ISLAND CREEK COAL SALES COMPANY, - - - *Plaintiff,*

v.

CITY OF GAINESVILLE, FLORIDA, - - - - *Defendant*

JUDGMENT

This case, having come before the Court on the defendant's motion to vacate that portion of the October 21, 1983 order which required it to accept certain coal shipments, and the Court having been advised, and having entered its memorandum opinion,

IT IS ORDERED AND ADJUDGED that the defendant's motion to vacate is overruled.

IT IS FURTHER ORDERED AND ADJUDGED that that portion of the Court's October 21, 1983 order which required the parties to report to the Court in the event of the parties' failure to reach an agreement is hereby vacated.

IT IS FURTHER ORDERED AND ADJUDGED that the failure of the defendant to accept the disputed shipments of coal under a commercially reasonable agreement will be grounds for a finding of contempt.

IT IS FURTHER ORDERED AND ADJUDGED that the thirty (30) day compliance period set forth in the October 21 order is reinstated as of the day after this order and the stay of November 4, 1983 is dissolved.

This is a final and appealable judgment and there is no just cause for delay.

Dated 12-1-83

(s) Charles M. Allen
Charles M. Allen, Chief Judge

cc: Counsel of Record

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title [9 USCS §§ 10, 11]. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(July 30, 1947, ch 392, § 1, 61 Stat. 672.)

§ 11. Same, modification or correction; grounds; order

In either of the folowing cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch 392, § 1, 61 Stat. 673.)

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch 392, § 1, 61 Stat. 673.)